STATE OF MICHIGAN

COURT OF APPEALS

AIDA HAMMOUDA,

Plaintiff-Appellee,

v

AHMAD MOURAD,

Defendant-Appellant.

UNPUBLISHED
August 12, 2010

No. 295668
Wayne Circuit Court
LC No. 01-137186-DM

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals a circuit court order that granted plaintiff's motion to change custody of the minor child. For the reasons set forth below, we affirm.

I. ESTABLISHED CUSTODIAL ENVIRONMENT

Defendant contends that the trial court erred when it ruled that an established custodial environment existed with both parties.[1] A trial court must determine whether an established custodial environment exists before it makes a determination regarding the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). A "custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Courts should also consider "[t]he age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship[.]" *Id.*

Defendant asserts that an established custodial environment existed solely with him by virtue of the December 2006 order awarding him physical custody and because the child lived

[1] "This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court's findings regarding the existence of an established custodial environment are reviewed under the great weight of the evidence standard and must be affirmed unless the evidence clearly preponderates in the opposite direction. *Id.* at 705-706.

with him from December 2006 until the trial court entered its order changing custody on December 8, 2009. However, a custody order, in and of itself, does not establish a custodial environment, and an established custodial environment may exist absent a custody order. *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008); *Bowers v Bowers*, 198 Mich App 320, 325; 497 NW2d 602 (1993). Further, contrary to defendant's implication, an established custodial environment may exist with both parents if a child looks to both parents for guidance, parental comfort, discipline, and the necessities of life. *Berger*, 277 Mich App at 707.[2]

The trial court's ruling that an established custodial environment existed with plaintiff as well as defendant is not against the great weight of the evidence. The record shows that the child looks to plaintiff for guidance and parental comfort. Plaintiff testified that the child asked her why she had to live with Iman when she had a "real mother" and that the child told plaintiff that plaintiff understood her better than anyone else because plaintiff is her mother. Plaintiff does not

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[2] Defendant argues that the trial court ignored that the child lived with both parties from the time of her birth in 1997 until the parties divorced in 2002, after which time defendant exercised parenting time until he was granted physical custody of the child in December 2006. Defendant also argues that plaintiff exercised no parenting time while she was in Lebanon from December 2006 through January 2008 and did not immediately seek to regain custody of the child after she returned from Lebanon. The record shows that plaintiff, defendant, and the child did not always live together as a family before the parties' divorce in 2002. Plaintiff and the child resided with plaintiff's sister in California for one week in 1999 and for six months in 2002 because of defendant's domestic violence against plaintiff. Defendant was awarded physical custody of the child in December 2006 only because plaintiff intended to live in Lebanon for a period of time to attend school. Plaintiff did not immediately seek to regain custody of the child when she returned from Lebanon because the child appeared to be doing fine and did not complain about living with defendant at that time.

Defendant also argues that, when it decided the issue of custodial environment, the court erroneously ruled that he did not provide enough assistance in the child's schooling. The record shows that, while living with defendant, the child did very poorly in school and received several failing grades. Defendant admitted that neither he nor his current wife, Iman, is able to help the child with her homework because they cannot read English. He also admitted that he hired a tutor to help the child after it was recommended that he do so three weeks before the evidentiary hearing and that, since then, her grades had improved. When plaintiff asked the child why her grades were so poor, the child told her that defendant does not speak English well, that Iman does not speak English at all, and that the 70-year-old neighbor who defendant asked to help was too old to offer any real assistance. This evidence supported the trial court's finding that defendant did not provide the child adequate help with her school work.

Defendant also challenges the trial court's determination that he failed to follow the recommendation of the child's doctor that he make sure that the child takes her medication for attention deficit disorder. Defendant offered contradictory testimony on this point. He claimed that the child was not currently taking her medication because she does not feel comfortable taking it, but he also testified that the child's teacher gives the child her medication every day at school. Thus, it is unclear whether the child received her medication while in defendant's custody.

work on weekends and is able to spend time with the child when the child visits her home. The child told plaintiff that nobody in defendant's home has time for her. The child had lived with plaintiff her entire life until plaintiff went to Lebanon in December 2006, including residing with plaintiff at plaintiff's sister's residence in 1999 and 2005. Thus, the record shows that over a significant period of time, plaintiff provided care, love, and guidance for the child and that their relationship is characterized by security, stability, and permanence. *Berger*, 277 Mich App at 706. Accordingly, the trial court's finding that an established custodial environment existed with both parties is not contrary to the great weight of the evidence.

II. STATUTORY BEST INTEREST FACTORS

Defendant challenges the trial court's factual findings on several of the best interest factors pursuant to MCL 722.23.[3]

Factor (b) requires the trial court to assess "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). The trial court ruled that this factor favors plaintiff because she was primarily responsible for the child's educational support until she went to Lebanon in 2006, plaintiff was unable to obtain information from the child's school after returning from Lebanon because defendant failed to list her as a parent on the child's emergency card, plaintiff is available during the evening and, unlike defendant, is able to assist the child with her schoolwork, and defendant failed to provide a tutor for the child until shortly before the evidentiary hearing despite the child's failing grades and attention deficit disorder. The trial court's findings regarding factor (b) are not against the great weight of the evidence.

Factor (c), MCL 722.23(c), required the trial court to assess "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." Defendant contends that he is better able to provide for the child financially because plaintiff earns only $1,200 to $1,500 a month, has a $900 monthly rental

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[3] If a trial court determines that an established custodial environment exists with both parents, then the court "'shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.'" *Pierron v Pierron*, 282 Mich App 222, 244-245; 765 NW2d 345 (2009), quoting MCL 722.27(1)(c). When making a child custody determination, a trial court must evaluate each of the 12 factors enumerated in MCL 722.23, make specific findings of fact regarding each factor, and weigh the factors to determine the child's best interests. *Thompson v Thompson*, 261 Mich App 353, 363; 683 NW2d 250 (2004); *McCain v McCain*, 229 Mich App 123, 124; 580 NW2d 485 (1998). We review a trial court's findings regarding the statutory best interest factors under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009); *Berger*, 277 Mich App at 705. "This Court will defer to the trial court's credibility determinations, and the trial court has discretion to accord differing weight to the best-interest factors." *Id.*

payment for her home, and must support herself, three other children, and her mother, who lives with her. The record shows that in addition to plaintiff's salary, her sister provides her with financial assistance. Although defendant argues that he is financially in a better position to provide for the child, factor (c) does not require the court to choose which party was in a better financial position. Nothing in the record shows that plaintiff lacks the capacity or disposition to provide the child with food, clothing, shelter, or other material needs. Though defendant maintains that plaintiff did not buy any clothes or shoes for the child since she returned from Lebanon, plaintiff was not asked that question during the evidentiary hearing and was not provided an opportunity to confirm or deny defendant's claim. Defendant also criticizes plaintiff for failing to pay $30 for a medication for the child, but the record shows that plaintiff tried to obtain the child's insurance card to determine whether the medication was covered but Iman refused to give her the card and refused to allow plaintiff to speak to defendant. Thus, the trial court's findings regarding factor (c) are not against the great weight of the evidence.

Factor (d) required the trial court to evaluate "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court ruled that this factor favors both parties equally. Defendant argues that this factor favors him because the child lived with him at the same residence since December 2006, and plaintiff lived in Lebanon for more than a year during that time. As noted, the record shows that the child lived predominantly with both parties from her birth until the parties' divorce in 2002, but that the child lived with plaintiff and plaintiff's sister in California for one week in 1999 and for six months in 2002. After the parties' divorce, plaintiff was awarded physical custody and the child resided with plaintiff until plaintiff went to Lebanon in December 2006, after which time the child resided with defendant Plaintiff did not immediately move to change custody when she returned from Lebanon in January 2008 because the child was doing "okay" living with defendant. When the child began to complain about her life in defendant's home, plaintiff moved to change custody. Plaintiff testified that she had lived in her current rental home for two years and intended to stay there. The trial court's findings regarding factor (d) are not against the great weight of the evidence.

Factor (f) required the trial court to assess "[t]he moral fitness of the parties involved," and factor (k) required the trial court to consider "[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child." MCL 722.23(f) and (k). The trial court determined that both factors favored plaintiff. With respect to these factors, defendant argues only that the trial court erred by admitting as evidence two police reports over defense counsel's hearsay objection. Were we to find that the trial court erroneously admitted the police reports, any error was harmless because the trial court did not rely on inadmissible hearsay in the police reports, but instead relied on the parties' testimony. Thus, their admission, if erroneous, was harmless.

Finally, factor (j) required the trial court to consider "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). The trial court concluded that this factor favors plaintiff. Plaintiff testified that when she calls defendant's home, she is forced to speak with Iman instead of defendant, that defendant never speaks to her, and that the child claimed that Iman will not allow defendant to speak with her. When plaintiff needed the child's insurance card to obtain a prescription, Iman refused to give plaintiff the card

and refused to allow her to talk to defendant. Plaintiff was also required to obtain a court order directing employees at the child's school to provide her information because defendant did not list plaintiff as an emergency contact. Defendant admitted that he last spoke to plaintiff three years previously and that he does not like to speak to her because they argue.

Defendant contends that the trial court unjustly criticized him for allowing plaintiff to visit the child only on alternate weekends and alternating Saturdays. Defendant maintains that he was in compliance with the December 18, 2006, consent order, which provided for parenting time on alternating weekends or other times as the parties may agree. The trial court's reliance on defendant's refusal to allow plaintiff additional parenting time was appropriate. Regardless of the parenting time schedule to which the parties agreed in December 2006, factor (j) required the trial court to assess defendant's willingness to facilitate and encourage a close relationship between the child and plaintiff, and the evidence clearly showed that he was unwilling to do so. Defendant refused to allow plaintiff to obtain information from the child's school and refused to allow her additional parenting time when she returned from Lebanon. Although defendant maintained during the evidentiary hearing that he would allow plaintiff more parenting time, his previous conduct indicates that his motivation to do so resulted from plaintiff's motion to change custody rather than a willingness to foster a close relationship between the child and plaintiff. Thus, the trial court's findings regarding factor (j) are not contrary to the great weight of the evidence.

In view of the trial court's findings regarding the statutory best interest factors, the trial court did not abuse its discretion in determining that it was in the child's best interests to award custody to plaintiff.

III. CHANGE OF CIRCUMSTANCES

Defendant argues that there was no evidence of a change of circumstances that would warrant a change in the prior custody order. "The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Brausch v Brausch*, 283 Mich App 339, 354; 770 NW2d 77 (2009). "A trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances." *Id.* at 355; see also MCL 722.27(1)(c). If the movant fails to do so, a trial court is precluded from holding a hearing to revisit a previous custody determination. *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). "[I]n order to establish a 'change of circumstances,' a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513 (emphasis in original). "This Court reviews a trial court's determination regarding whether a party has demonstrated proper cause or a change of circumstances under the great weight of the evidence standard." *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009).

The trial court ruled that three factors constituted a change of circumstances: (1) plaintiff's return from Lebanon, (2) defendant's refusal to allow parenting time except on alternate weekends, and (3) the child's failing grades and the fact that neither defendant nor Iman is able to help the child with her schoolwork. Defendant argues that this was an insufficient basis to establish a change of circumstances.

The record shows that plaintiff agreed to give defendant physical custody of the child only because she was leaving the United States and would be residing in Lebanon for approximately one year. The trial court entered the consent order changing custody in December 2006, when plaintiff left the country. Plaintiff returned in January 2008 and asked defendant for more parenting time than was provided in the December 2006 order, but defendant refused. Plaintiff filed a petition for an order to show cause so that she could exercise parenting time with the child and the trial court entered an order establishing a parenting time schedule. Thus, the record shows that since the December 2006 custody order, plaintiff had returned from Lebanon and defendant was unwilling to allow her parenting time with the child. Plaintiff's return from Lebanon after a one-year absence and her desire to have a normal mother-daughter relationship with her daughter was a material change that occurred after entry of the December 2006 custody order and defendant's refusal to allow plaintiff to exercise parenting time could have significantly affected the child's well-being. *Vodvarka*, 259 Mich App at 513.

Further, although defendant contends that the child never excelled academically, the record shows that, during his year of custody, the child had serious problems in school and he was unable to help her. Thus, the child's decline in grades and school attendance was a material change that had occurred since the December 2006 custody order and it either had or could have a significant effect on the child's well-being. *Vodvarka*, 259 Mich App at 513. Accordingly, it was not against the great weight of the evidence for the trial court to rule that there existed a change of circumstances warranting an evidentiary hearing to reconsider the December 2006 custody order.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad